Supreme Court, U.S.
FILED
FEB 9 2001
OFFICE OF THE CLERK

No. 001289

In the Supreme Court of the United States

DOROTHY MACKEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOANNE JOCHA ERVIN *
135 W. DOROTHY LANE
SUITE 101
DAYTON, OHIO 45429-1477
(937) 294-8420

MARK E. WOJCIK
THE JOHN MARSHALL
LAW SCHOOL
315 S. PLYMOUTH COURT
CHICAGO, ILLINOIS 60604-3639
(312) 987-2391

Counsel for Petitioner

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

49pp

QUESTIONS PRESENTED

1. Does the doctrine set forth in *Feres v. United States*, 340 U.S. 135 (1950), bar state law claims of sexual harassment and intentional infliction of emotional distress, where varied and persistent acts of harassment took place in a military context but did not arise out of (a) combatant activities; (b) foreign activities; or (c) any other acts listed in 28 U.S.C. § 2680 as an exception to the waiver of sovereign immunity under the Federal Tort Claims Act?

2. Should the *Feres* doctrine extend to protect sexual harassment, when the underlying acts of sexual harassment are specifically prohibited by the military and do not advance any military or governmental purpose?

3. If the *Feres* doctrine does bar a claim of sexual harassment by uniformed military personnel in peacetime, should the *Feres* doctrine be overruled?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties (Dorothy Mackey and the United States of America). Dorothy Mackey, the Petitioner, is an individual and has no corporate affiliations. The United States has been substituted for two individual defendants, each of whom is or was a military officer when named in the complaint as originally filed.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

a. Procedural History 4

b. Statement of Facts 6

c. Statement of Lower Court Jurisdiction 11

REASONS FOR GRANTING THE WRIT 11

1. The Court of Appeals' Application of the *Feres* Doctrine to Bar Petitioner's Claims of Sexual Harassment and Intentional Infliction of Emotional Distress Is In Conflict With This Court's *Feres* Jurisprudence and the Plain Language of 28 U.S.C. § 2680 . . . 11

2. Allowing the Litigation Would Support the Military's Own Efforts to Rid Itself of Sexual Harassment 18

3. If the Court of Appeals Correctly Applied the *Feres* Doctrine to Bar Mackey's Sexual Harassment Claims, This Court Should Revisit the Wisdom of the Doctrine In Light of the Strong National Policy Against Sexual Harassment 20

CONCLUSION 27

APPENDIX

Appendix A
Court of Appeals Opinion, September 12, 2000 . . . . . 1a

Appendix B
District Court Order, July 16, 1999 . . . . . 10a

TABLE OF AUTHORITIES

Cases

Bivens v. Six Unknown Federal Narcotics Agents,
403 U.S. 388 (1971) 14

Block v. Neal,
460 U.S. 289 (1983) 18

Boyle v. United Technologies Corp.,
487 U.S. 500 (1988) 16

Burlington Industries v. Ellerth,
524 U.S. 742 (1998) 21

Chappell v. Wallace,
462 U.S. 296 (1983) 14

Dalehite v. United States,
346 U.S. 15 (1953) 15

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 21, 23

Feres v. United States,
340 U.S. 135 (1950) . . . . . *passim*

Fleming v. United States Postal Serv.,
186 F.3d 697 (6th Cir. 1999) 15, 25

Gonzales v. Department of Army,
718 F.2d 926 (9th Cir. 1983) 22

Gutierrez de Martinez v. Lamagno
515 U.S. 417 (1995) 5

Hodge v. Dalton, 107 F.3d 705 (9th Cir.),
cert. denied, 522 U.S. 815 (1997) 22

Indian Towing Co. v. United States,
350 U.S. 61 (1955) 13

Johnson v. Alexander,
572 F.2d 1219 (8th Cir.),
cert. denied, 439 U.S. 986 (1978) 22, 24

Jones v. United States,
112 F.3d 299 (7th Cir.), *cert. denied*,
522 U.S. 865 (1997) 13

Mackey v. Milam,
154 F.3d 648 (6th Cir. 1998), *cert. denied*,
527 U.S. 1035 (1999) 5, 19, 20

Meritor Sav. Bank v. Vinson,
477 U.S. 57 (1986) 21

Randall v. United States,
95 F.3d 339 (4th Cir. 1996), *cert. denied*,
519 U.S. 1150, *reh'g denied*,
520 U.S. 1182 (1997) 22

Rayonier, Inc. v. United States,
352 U.S. 315 (1957) 15, 17

Roper v. Department of Army,
832 F.2d 247 (2d Cir. 1987) 22

Santiago-Ramirez v. Secretary of the Dept. of Defense,
984 F.2d 16 (1st Cir. 1993) 18

Sheridan v. United States,
487 U.S. 392 (1988) 13

Smith v. United States,
196 F.3d 774 (7th Cir. 1999),
cert. denied, ___ U.S. ___,
120 S.Ct. 1676 (2000) 13, 25

Stencel Aero Eng'g Corp. v. United States,
431 U.S. 666 (1977) 13, 24

Taber v. Maine,
67 F.3d 1029 (2d Cir. 1995) 25

Truman v. United States,
26 F.3d 592 (5th Cir. 1994) 17

United States v. Brown,
348 U.S. 110 (1954) 12

United States v. Johnson,
481 U.S. 681 (1987) 12, 19

United States v. Muniz,
374 U.S. 150 (1963) 12

United States v. Shearer,
473 U.S. 52 (1985) 12, 13, 18, 19

United States v. Stanley,
483 U.S. 669 (1987) 14, 24, 26

Constitutional Provisions

U.S. Const. art. 1 § 8 15

Statutes and Regulations

10 U.S.C. § 938 22
10 U.S.C. § 1552 22
28 U.S.C. § 1291 11
28 U.S.C. § 1292(b) 11
28 U.S.C. § 1331 11
28 U.S.C. § 1346(b) 1, 2, 4, 16, 27
28 U.S.C. § 1346(b)(1) 11
28 U.S.C. § 1441(a) 11
28 U.S.C. § 1441(b) 11
28 U.S.C. § 2671 *et seq.* 4, 27
28 U.S.C. § 2674 27
28 U.S.C. § 2679(d)(2) 4, 11
28 U.S.C. § 2680 . . . . . i, 1, 11, 16
28 U.S.C. § 2680(a) 15
28 U.S.C. § 2680(h) 14, 16, 17, 18
28 U.S.C. § 2680(j) 15, 16
28 U.S.C. § 2680(k) 16
Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000e 21
29 C.F.R. § 1614.103(d)(1) (2000) 22
32 C.F.R. § 191 22
Fed. R. Civ. P. 59(e) 5

Law Reviews and Other Authorities

Darpino, *Eroding the Feres Doctrine --*
A Critical Analysis of Three Decisions,
1996 Army Law. 26 25

Greenlaw & Port, *Military Versus Civilian Judicial Handling of Sexual Harassment Cases*, 44 Lab. L. J. 368 (1993) 23, 24

Holzer, *The Endless Ordeals of Jacqueline Ortiz: A Desert Storm Soldier's Unsuccessful Attempt to Recover for a Sexual Assault by Her First Sergeant*, 24 N. M. L. Rev. 51 (1994) 24

Hornbrook & Kirschbaum, *The Feres Doctrine: Here Today - Gone Tomorrow?*, 33 Air Force L. Rev. 1 (1990) 25, 26

Mattern, *Lutz v. Secretary of the Air Force: At the Edge of Feres?*, 36 Air Force L. Rev. 161 (1992) 25

Perlstein, *TDRL and the Feres Doctrine*, 43 Air Force L. Rev. 259 (1997) 26

Rogers, *A Proposal for Combating Sexual Discrimination in the Military: Amendment of Title VII*, 78 Calif. L. Rev. 165 (1990) 22

Seidelson, *From Feres v. United States to Boyle v. United Technologies Corp.: An Examination of Supreme Court Jurisprudence and a Couple of Suggestions*, 32 Duq. L. Rev. 219 (1994) 25

Spak & Tomes, *Sexual Harassment in the Military: Time for a Change of Forum*, 47 Clev. St. L. Rev. 335 (1999) 20

Tomes, *Feres* to *Chappell* to *Stanley*: *Three Strikes and Servicemembers Out*, 25 U. Rich. L. Rev. 93 (1990) 25

Note, *Boyle v. United Technologies Corp. and the Government Contractor Defense: An Analysis Based on the Current Circuit Split Regarding the Scope of the Defense* (authored by Sean Watts), 40 Wm. & Mary L. Rev. 687 (1999) 16

1 *Secretary of the Army's Senior Review Panel Report on Sexual Harassment 12* (1997) 19

Legislative History

Women in the Military: Hearings Before the Military Personnel and Compensation Subcomm. of the House Comm. on Armed Services, 100th Cong., 1st and 2d Sess. 28, 136 (1987 and 1988) 23

DOROTHY MACKEY respectfully petitions this Court for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit, entered on September 12, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals, *Mackey v. United States,* 226 F.3d 773 (6th Cir. 2000) (per Norris, Circuit J., with Nelson, Circuit J. and Matia, District J.) is reproduced in Appendix A. The district court's unpublished Order (a one-page decision substituting the United States as defendant and entering judgment on behalf of the United States) (Susan B. Dlott, J.) is reproduced in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit affirming the district court's grant of judgment to the United States was filed September 12, 2000. App. A. On November 30, 2000, under No. 00A480, Justice Stevens granted petitioner's application for an extension of time to file this petition until February 9, 2001. Rules 13.1, 13.3, 13.5, and 30.1 (1999 rev.). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED
The Federal Tort Claims Act
28 U.S.C. § 2680

The provisions of this chapter and section 1346(b) of this title shall not apply to-

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the

execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

STATEMENT OF THE CASE

This petition arises from the uncertainty created by the extension of the *Feres* doctrine to prohibit intentional tort claims not specifically mentioned in the carefully delineated exceptions to the broad waiver of tort liability created by the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*

a. Procedural History

The petitioner, Dorothy Mackey, is a former captain in the United States Air Force. While she was in the service, her superior officers, Colonel David W. Milam and Lieutenant Colonel Travis E. Elmore, allegedly subjected her to various forms of sexual harassment from the fall of 1991 until the fall of 1992. She brought suit in the Court of Common Pleas of Montgomery County, Ohio in December 1994, based on numerous acts of verbal harassment and physical contact. Among other allegations, her complaint included two counts for intentional infliction of emotional distress.

After the case had proceeded in the Ohio state court for some 15 months, the U.S. Attorney certified, under the Westfall Act, 28 U.S.C. § 2679(d)(2), that Milam and Elmore were acting "within the scope of their employment" and authorized representation of them. The United States of America was then substituted for Milam and Elmore and on May 1, 1996, the case was removed to the U.S. District Court for the Southern District of Ohio.

The district court, assuming the truth of the allegations of the complaint, determined that sexual harassment was outside the scope of employment and ruled that the United States had been improperly substituted for Milam and Elmore.

Exercising its authority under *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), the district court remanded the case to the Ohio state court. Following the government's motion for reconsideration under Fed. R. Civ. P. 59(e), the district court declined to revisit its "scope of employment" holding but vacated the remand order to permit discovery on the facts underpinning the "scope" issue. Following motion by the United States, the district court on April 22, 1998, certified the "scope of employment" issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

On appeal, a divided panel of the Sixth Circuit on September 10, 1998, reversed, finding that Milam and Elmore had been acting within the scope of their employment. *Mackey v. Milam,* 154 F.3d 648 (6th Cir. 1998). Mackey's petition for rehearing was denied, Judge Cole dissenting, by order dated October 27, 1998. On motion by Mackey, who was then the appellee, the Sixth Circuit on December 14, 1998, stayed its mandate to permit filing of a petition for writ of certiorari.

Mackey's first petition for writ of certiorari, filed on March 26, 1999, challenged the Attorney General's certification under the Westfall Act. That petition presented questions relating to interlocutory order jurisdiction and whether resort to state or federal law determines the "scope of employment" question. This Court denied Mackey's first petition on June 24, 1999. *Mackey v. Milam,* 527 U.S. 1035 (1999).

On July 16, 1999, the district court upon mandate determined that Milam and Elmore were acting within the scope of their employment, substituted the United States for them, and entered judgment on behalf of the United States

based upon the *Feres* doctrine. App. B. Petitioner timely appealed the district court's order.

On appeal, the Sixth Circuit on September 12, 2000, affirmed the judgment of the district court. *Mackey v. United States,* 226 F.3d 773 (6th Cir. 2000). On November 30, 2000, Justice Stevens extended the time for filing this petition until February 9, 2001.

b. Statement of the Facts

This case involves varied forms of serious and pervasive sexual harassment by military superiors, harassment that the victim could not control until she, lacking any other corrective option, abandoned a promising military career to escape her tormentors.

Dorothy Mackey ascended through the ranks to become a captain in the United States Air Force. After duty in Mississippi and Germany and a work-study assignment at the Grumman Corporation, Captain Mackey was assigned to Wright Patterson Air Force Base ("Wright-Patt") in Dayton, Ohio, where she was a headquarters squadron section commander. While at Wright-Patt, she was under the authority of Colonel David W. Milam, chief of staff and inspector general for the aeronautical systems division, and Lieutenant Colonel Travis E. Elmore, assistant chief of staff and assistant inspector general.

While she served as squadron section commander, Captain Mackey was subjected to sexual harassment by both Milam, retired shortly after the lawsuit was filed, and Elmore. The harassment, coming from her high-ranking superiors, took the forms of sexual innuendoes about her body, verbal harassment, inappropriate bodily touching, and

unrelenting sexual advances by her direct superiors. Milam and Elmore through their actions and powerful positions created a physically threatening and humiliating work place from which Captain Mackey could not escape. This eventually destroyed the ability of Captain Mackey, a once honored nominee for "Federal Woman Supervisor of the Year," to serve the United States Air Force and her country.

For example, shortly after her hiring into the section commander position at Wright-Patt, Elmore, her direct superior, expressed an interest in Captain Mackey's breasts. During one meeting, Captain Mackey observed Elmore looking at her breasts and smiling. Captain Mackey, realizing that her nipples were erect from the cold, turned red and crossed her arms over her chest. Elmore sniggered and said that the erection was a "natural reaction." Even though Captain Mackey told Elmore that his comment was inappropriate and that she did not appreciate it, Elmore continued to stare, grin, and chuckle. Over a period of many months, Elmore continued to stare at Captain Mackey's breasts during meetings. He commented upon Captain Mackey's weight, body, and legs and complimented her appearance. He expressed interest in her legs and small waist and on one occasion put his hands around her waist as if to measure it. During one meeting, Elmore ordered Captain Mackey to stand and turn around, and then commented approvingly on her body and appearance by stating, "Very nice, very nice." When seated across from her at a table in his office, Elmore routinely pushed his chair far enough back and away from the table so that he could, and did, look under the table at her legs.

In October of 1991, Elmore's leering and commenting escalated into touching when he took it upon himself on the first of several occasions to massage Captain Mackey's neck

during a meeting. In early 1992, following an injury to Captain Mackey's leg, Elmore during a meeting moved from his desk to where Captain Mackey was sitting and touched her leg from knee to ankle as if he were conducting a physical examination.

In the late spring or early summer of 1992, while Captain Mackey was seated in his office, Elmore began to conduct a quasi-pelvic exam upon her. He got out of his chair, walked over to Captain Mackey, placed both of his hands on her stomach and pressed down. He then began to move his hands down the front of her uniform pants, with his thumbs up and fingers wrapped around her back. He continued to move his hands downward, pressing in on Captain Mackey's abdomen, despite her protests. When he got to Captain Mackey's pubic area, he said that she should see a physician. During the entire time, Mackey was alarmed, extremely nervous, and sweating.

Elmore also persisted in attempts to use his position of power over Captain Mackey to advance an unwanted intimate relationship beyond their professional relationship. He invited her to join him for lunch and for dancing. In August of 1992, he telephoned Captain Mackey's home around 10:00 p.m. from a local nightspot and insisted that she meet him there. Captain Mackey begrudgingly relented when Elmore said that he had her resume with him and that he would review it with her, something that she had been trying to get him to do for some time. Captain Mackey realized that Elmore, as her superior, held the strings to her future career in his hands. Elmore abused this power by using it to advance his sexual interests in Captain Mackey. While the two of them were seated at the bar, Elmore pulled her stool closer to his and rubbed his hand up and down her back, dropping his hand below her waist on several occasions. After being invited by

him to slow dance, Captain Mackey said she had to leave. Elmore walked her to her car and, by leaning against the driver's door, prevented her from leaving for approximately 30 minutes, during which time he expressed his desire to follow her home and come in for a nightcap.

Colonel Milam pulled the web of sexual harassment spun by Lieutenant Colonel Elmore even tighter. As Elmore's direct superior, Milam not only implicitly approved of the sexual harassment of Captain Mackey but also took part in it himself. Captain Mackey alleged that Milam touched her shoulders, arms and forearms when speaking to her and, when seated, would place his hand on hers or squeeze her arm. Milam appeared to be both pleased and amused when Captain Mackey blushed or startled at this attention. He even told her on one occasion that he knew his touching bothered her. Milam discussed sexually charged topics in Captain Mackey's presence, including a description of the "female entertainment" at a recent bachelor party. He also looked at her body in a way that made her uncomfortable, leered at her legs, and told her that he liked to see her in her skirted uniform. In conversation, he repeatedly stood so close to her that she could feel his breath on her face and neck. He often commented upon her perfume and make-up while standing close. Milam startled her by latching the lock on his office door when she met with him. He demeaned Captain Mackey in front of others by talking about the need to "jump on her butt" and commenting upon her physical appearance. In addition, Milam habitually slapped her on the back hard enough to throw her off balance.

Between September of 1991 and August of 1992, Captain Mackey made numerous attempts to end the torment that Milam and Elmore were inflicting upon her and forcing her to endure. When Captain Mackey reached out for support

to a friend who was a civilian employee, Milam ordered her to cease contact with that person. Another time, she discreetly approached Milam's secretary and described the abuse and harassment. She reported Elmore to Milam. She reported Milam to Elmore. She also told the chief to a Wright-Patt general, Milam's superior officer, about the difficulties that she was having with Milam.

By mid-spring of 1992, Captain Mackey was becoming increasingly anxious and apprehensive around Milam and Elmore. She lost her appetite and her weight dropped from five to nine pounds each week. She was jumpy and trembling and unable to sleep for more than a few hours at a time. She experienced panic attacks, outbursts of crying, and chest pains.

Unable to cope any further with the sexual harassment, and viewing an early out as the only way to deal with the daily physical, mental, and emotional turmoil, Captain Mackey applied on May 29, 1992 for early separation from the Air Force. Her application was approved with September 29, 1992 being scheduled as her last day of service.

Following her discharge, Captain Mackey was hospitalized as an in-patient at a psychiatric facility for major depression with underlying anxiety syndrome. She has been treated at two Veterans Administration facilities for post-traumatic stress syndrome. At the time the complaint was filed, Captain Mackey was still experiencing generalized anxiety, dizziness, crying bouts, feelings of being overwhelmed, night awakening, startling, difficulty in concentrating, fear of men, withdrawal, disassociation, and loss of interest in family and life activities. Following her separation from the Air Force, Captain Mackey sought

reinstatement from the Air Force Board for Correction of Military Records.

c. Statement of Lower Court Jurisdiction

The district court's jurisdiction was originally invoked by removal from an Ohio state court on certification of the United States Attorney under the Westfall Act, 28 U.S.C. § 2679(d)(2). Upon substitution of the United States for Milam and Elmore, the district court would have had jurisdiction under 28 U.S.C. § 1346(b)(1). The certification was successfully challenged in the district court, but that court's order was reversed by the Sixth Circuit which had interlocutory jurisdiction under 28 U.S.C. § 1292(b). In Captain Mackey's petition for a writ of certiorari, this Court's jurisdiction was invoked under 28 U.S.C. § 1254(1).

Following denial of the petition that challenged the substitution of the United States for the individual defendants, the district court had jurisdiction under 28 U.S.C. §§ 1331, 1441(a), 1441(b), 2679(d)(2) and 1346(b)(1). On this appeal after substitution of the United States, the Sixth Circuit had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' Application of the *Feres* Doctrine to Bar Petitioner's Claims of Sexual Harassment and Intentional Infliction of Emotional Distress Is In Conflict With This Court's *Feres* Jurisprudence and the Plain Language of 28 U.S.C. § 2680.

Under the *Feres* doctrine, "the Government is not liable under the Federal Tort Claims Act for injuries to

servicemen where the injuries arise out of or in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950). *Feres*, and all of the cases decided under the *Feres* doctrine by the U.S. Supreme Court, have involved allegations of negligent acts. *See United States v. Johnson*, 481 U.S. 681, 686 (1987); *see also United States v. Shearer*, 473 U.S. 52, 57 (1985) (extreme results might obtain if suits were allowed for "negligent orders given or negligent acts committed") (citing *United States v. Muniz*, 374 U.S. 150, 162 (1963)). The *Feres* doctrine is, at heart, a bar to any negligence claim against the United States where either the victim or the negligent party is a uniformed member of the armed services.

Feres itself was a consolidation of three cases that arose under the FTCA, each of which alleged negligence by the military in a non-combat context. The Feres plaintiff alleged negligence in the quartering of a serviceman who died in a barracks fire; the Jefferson plaintiff alleged medical negligence following the removal of an 18 by 30-inch towel marked "Medical Department U.S. Army" from the abdomen of a serviceman who had undergone surgery prior to discharge; the Griggs plaintiff alleged medical negligence in the death of a serviceman at the hands of an Army surgeon. 340 U.S. at 136-37. The *Feres* court stated that "[t]he common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." *Id.* at 138.

Subsequent Supreme Court decisions reaffirmed the *Feres* doctrine's bar of negligence claims to military personnel. In *United States v. Brown*, 348 U.S. 110, 110-11 (1954), a veteran had filed suit for a medical malpractice injury from an operation at a Veteran's Administration Hospital. Although the surgery was necessary to correct an

injury he had sustained while he was still on active duty, the medical malpractice injury was sustained when he was no longer in the service. The dissent noted that if the veteran had still been in the service, *Feres* would have barred his medical malpractice claim. *Id.* at 113 (Black, J., dissenting). In *Indian Towing Co. v. United States,* 350 U.S. 61, 62 (1955), the plaintiff alleged negligence in the operation of a lighthouse by the U.S. Coast Guard, which failed to warn that the lighthouse beam was not functional, causing a ship to go aground. In *Stencel Aero Eng'g Corp. v. United States,* 431 U.S. 666, 667 (1977), a negligence and third-party indemnification action, a military F-100 fighter pilot sued the United States and the manufacturer of an emergency eject system that had malfunctioned. In *Johnson*, the wife of a deceased Coast Guard helicopter pilot alleged negligence on the part of Federal Aviation Administration officials who, after assuming positive radar control over her husband's helicopter, permitted it to crash. 481 U.S. at 682-83. In *Sheridan v. United States,* 487 U.S. 392, 394-96, 403 (1988), the plaintiff alleged negligence in his injury by a drunken naval medical aide who fired several rifle shots into his automobile and who was not prevented from doing so by three navy corpsmen who did nothing to stop him, although they knew that the aide was drunk and brandishing a weapon.

Even this Court's *Feres*-like cases do not give the *Feres* doctrine reach beyond claims of negligence. *United States v. Shearer,* 473 U.S. 52, 54-55 (1985), often is cited as a *Feres* case, *see e.g., Smith v. United States,* 196 F.3d 774 (7th Cir. 1999), *cert. denied,* 120 S.Ct. 1676 (2000) (citing *Jones v. United States,* 112 F.3d 299 (7th Cir.), *cert. denied,* 522 U.S. 865 (1997), but it is not. The complaint of the *Shearer* plaintiff, the mother of an Army serviceman who was kidnapped and murdered by another serviceman, asserted negligence but this Court looked behind the pleadings and

determined that, since battery caused the death of the plaintiff's son, the claim was expressly barred by the "assault" and "battery" exceptions to the waiver of Federal tort liability. *Shearer*, 473 U.S. at 55. Thus, even though this Court said that the *Shearer* result was consistent with the rationale of *Feres*, this Court relied not on the *Feres* doctrine but, rather, on the statutory bar to suit provided by 28 U.S.C. § 2680(h).

Nor is the *Feres* doctrine's bar to negligence actions broadened by *Chappell v. Wallace*, 462 U.S. 296 (1983), or *United States v. Stanley*, 483 U.S. 669 (1987), each of which involved a Constitutional claim under *Bivens v. Six Unknown Federal Narcotic Agents*, 403 U.S. 388 (1971). The Court of Appeals erroneously concluded that *Feres* had been applied to bar claims of constitutional violations in *Chappell*. *See Mackey v. United States*, 226 F.3d at 775. While it is true that this Court in *Chappell* and *Stanley* found, in *Feres*, the "special factors" which mitigated against the allowance of a *Bivens* claim based upon the United States Constitution, this Court also noted that it might have felt freer to compromise military concerns under the FTCA, which explicitly authorizes certain suits against the Government. *Stanley*, 483 U.S. at 681-82. Because a *Bivens* action is inferred from the Constitution, the judiciary must exercise greater caution when the Constitution directs Congress to make rules for the armed forces. *Id.* at 682.

Although petitioner's claims did not sound in negligence, the Sixth Circuit misapplied the *Feres* doctrine to bar them. The Sixth Circuit misapplied this Court's prior precedents by stretching the *Feres* doctrine beyond its roots in negligence to bar non-Constitutional intentional tort claims, which are not explicitly excluded by 28 U.S.C. § 2680.

Contrary to the thrust of this Court's *Feres* jurisprudence, the Court of Appeals explicitly found that the *Feres* doctrine stems from the exception for claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *See* 226 F.3d at 775 (citing 28 U.S.C. § 2680(j) and *Fleming v. United States Postal Serv.*, 186 F.3d 697, 699 (6th Cir. 1999)).

This was wrong for two reasons. First, root for the *Feres* doctrine in the "combatant activities" exception is unlikely given this Court's admonition against reading "exemptions into the Act beyond those provided by Congress." *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957). Congress is presumed to mean what it says and thus the explicit exception for combatant activities during time of war implicitly excludes, from exception to the broad waiver of tort liability, claims arising out of non-combatant activities of the military. This is particularly true where the Constitution mandates that Congress, and not the judicial branch, has the power "To make Rules for the Government and Regulation of the land and naval Forces" as well as the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ." U.S. Const. art. 1, § 8.

Root in the "combatant activities" exception is unlikely for a second reason as well. Because the *Feres* doctrine developed in the context of negligence, the discretionary function exception to the waiver of tort liability, *see* 28 U.S.C. § 2680(a), is more consistent with the *Feres* case law. For example, in *Dalehite v. United States,* 346 U.S. 15 (1953), an action under the FTCA alleging negligence by Federal agents in the adoption of a post-war plan to produce and distribute fertilizer grade ammonium nitrate, in the manufacturing process itself and in the failure

to police the loading of the product for shipment by water, this Court barred the action based upon the discretionary function exception set forth in 28 U.S.C. § 2680(a). *Accord Boyle v. United Technologies Corp.*, 487 U.S. 500, 511 (1988); *see also* Note, *Boyle v. United Technologies Corp. and the Government Contractor Defense: An Analysis Based on the Current Circuit Split Regarding the Scope of the Defense*, 40 Wm. & Mary L. Rev. 687, 694 (1999).

In contrast to the negligence claims typically barred by the *Feres* doctrine are petitioner's non-Constitutional intentional tort claims arising from the non-combatant activities of military personnel. The Federal Tort Claims Act allows civil actions against the government based on the negligent acts or omissions of its employees, including members of the military. *See* 28 U.S.C. §§ 1346(b), 2671, 2674. Dorothy Mackey's claims of intentional infliction of emotional distress and sexual harassment are not explicitly excepted by the plain language of 28 U.S.C. § 2680. First, her claims do not arise out of the "combatant activities of the military or naval forces" and thus are not barred by 28 U.S.C. § 2680(j). Second, her claims arose entirely in the United States, rather than a foreign military post, and are thus not barred by 28 U.S.C. § 2680(k). Third, her complaint alleges claims that are not specifically barred by 28 U.S.C. § 2680(h). The first two counts of the complaint, for example, allege causes of action for intentional infliction of emotional distress, a cause of action that is distinct from the "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights," claims which are explicitly barred by 28 U.S.C. § 2680(h).

In contrast to the approach suggested by the Sixth Circuit, the Fifth Circuit had held that a claim of sexual harassment could be read as stating a claim for intentional infliction of emotional distress, and that such a claim would not be barred by section 2680(h) of the Federal Tort Claims Act. *See Truman v. United States,* 26 F.3d 592, 596 (5th Cir. 1994). In *Truman,* a male Air Force employee who worked at the commissary had the right to supervise a woman who worked for a vendor-stocker. She alleged that he created a hostile work environment through a series of off-color remarks, dirty jokes, and untoward winks and nods. The harassment continued until the woman resigned from her position. She then sought compensation for her mental anguish, anxiety, embarrassment, and humiliation. The United States moved to dismiss the claims as barred by several exceptions to the FTCA listed in 28 U.S.C. § 2680(h). That exception retains sovereign immunity for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *Id.*

In reversing the district court's dismissal of Truman's case, the Fifth Circuit noted that there was no justification for any court to read exemptions into the Federal Tort Claims Act beyond those provided by Congress. *Truman,* 26 F.3d at 594 (citing *Rayonier, Inc. v. United States,* 352 U.S. 315, 320 (1957)). The court found that the numerous sexual insults, comments, innuendoes and other allegations "could be read to state a claim for intentional infliction of emotional distress – not a claim for assault, battery, or slander" and determined that a claim for intentional infliction of emotional distress based on the conduct described in Truman's complaint was not barred by an exception to the FTCA. *Id.* at 595. Citing its own list of cases, the Fifth Circuit said that it was

following the lead of the First, Second, Eighth, and Ninth Circuits in holding that a "claim for intentional infliction of emotional distress does not fall within the definition of a tort listed in section 2680(h)." *Id.* at 597.

In Dorothy Mackey's complaint, Counts I and II allege "intentional infliction of emotional distress" against each of her two supervisors. That tort is not specifically listed in section 2680(h). Furthermore, even in the case where the facts of the complaint might give rise to similar torts, the partial overlap between two tort actions does not support the conclusion that if one is excepted under the Tort Claims Act the other must be as well." *Santiago-Ramirez v. Secretary of the Dept. of Defense,* 984 F.2d 16, 20 (1st Cir. 1993) (citing *Block v. Neal*, 460 U.S. 289, 298 (1983)).

In the absence of an explicit statutory bar to claims of sexual harassment, the Court of Appeals erred by relying upon the *Feres* doctrine to deprive petitioner of her day in court. This Court should grant Mackey's petition to correct that grievous error. Furthermore, to the extent that the decision of the Sixth Circuit and the authorities cited by it represents a split between it and the decision by the Fifth Circuit and the authorities cited by it, the Supreme Court should take this opportunity to resolve those differences.

2. Allowing the Litigation Would Support the Military's Own Efforts to Rid Itself of Sexual Harassment.

The rationales cited by the Sixth Circuit in support of its extension of *Feres* to negligent acts do not, in fact, support that decision. First, the court cited the rationales as stated in *Shearer,* 473 U.S. at 57:

> a. The peculiar and special relationship of the soldier to his superiors;
>
> b. The effect of the maintenance of such suits on discipline; and
>
> c. The extreme results that might obtain if suits under the FTCA were allowed for negligent orders given or negligent acts committed in the course of duty.

Mackey, 226 F.3d at 774.

As to the first two rationales, it is disingenuous to forget that it is not the threat of litigation but rather the pervasive problem of sexual harassment itself that is the cause of breakdowns in good order and discipline. *See* 1 *Secretary of the Army's Senior Review Panel Report on Sexual Harassment* 12 (1997). As to the third rationale, it boggles the mind to consider how the Sixth Circuit could misread a rationale expressly based on liability for negligent acts as supporting an extension of the *Feres* doctrine to intentional acts. It also boggles the mind to consider how the Court could look at those first two elements without considering the third. Perhaps implicitly recognizing that these *Shearer* rationales did not support the decision that it reached, the Sixth Circuit then immediately listed the rationales stated in *Johnson*, 481 U.S. at 689-91, decided just two years after *Shearer:*

> (1) The distinctively federal character of the relationship between the government and members of its armed forces;

> (2) The existence of generous statutory disability and death benefits; and
>
> (3) The impact of allowing lawsuits, which would involve the judiciary in sensitive military matters at the expense of military discipline and effectiveness.

Mackey, 226 F.3d 775.

As to this set of rationales, the generous benefits are unavailable to women who are forced out of their military careers by harassers. The military simply does not have any effective mechanism for protecting the victims of sexual harassment or for compensating them for the harms that they suffer. *See, e.g.*, Spak & Tomes, *Sexual Harassment in the Military: Time for a Change of Forum?*, 47 Clev. St. L. Rev. 335, 369 (1999). As to the remaining rationales, a lawsuit challenging sexual harassment serves to strengthen the integrity of military discipline and would reinforce the military's current policies against sexual harassment.

The *Feres* doctrine should not shield acts of sexual harassment, especially when the military is trying to rid itself of sexual harassment that does not advance any military or governmental purpose.

3. If the Court of Appeals Correctly Applied the *Feres* Doctrine To Bar Mackey's Sexual Harassment Claims, This Court Should Revisit the Wisdom of that Doctrine In Light of the Strong National Policy Against Sexual Harassment.

Workplace sexual harassment takes a significant toll on its victims and society as a whole. "It is by now well

recognized that hostile environment sexual harassment by supervisors (and, for that matter, co-employees) is a persistent problem in the workplace." *Faragher v. City of Boca Raton,* 524 U.S. 775, 798 (1998). Where a supervisor carries out the sexual harassment, the problem is compounded because "the victim may well be reluctant to accept the risks of blowing the whistle on a superior." *Id.* at 803. A victim can often remove herself from the reach of a co-worker who is sexually harassing her, but it is more difficult to do so when the harasser is a supervisor with the unspoken power of retaliation. *See id.* at 805. This Court has recognized that proximity and regular contact can create a captive pool of potential victims for an harassing supervisor. *See Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 760 (1998).

Most employees in this country, men and women, are protected from sexual harassment. Under most circumstances, Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult. *Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 65 (1986). An employee may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. *Id.* at 66. Supervisors are entrusted with daily supervision of the work environment and with ensuring a safe and productive workplace. *Id.* at 76. A supervisor who violates this trust, where the violation culminates in a tangible employment action, creates vicarious liability in the employer. *Faragher,* 524 U.S. at 808.

Dorothy Mackey, in contrast, had no effective remedy when her superior officers subjected her to sexual harassment.

First, in 1994, most all of the courts which had considered the issue had ruled that Title VII of the Civil

Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, does not apply to uniformed members of the military. *See, e.g., Roper v. Department of Army,* 832 F.2d 247, 248 (2d Cir. 1987); *Gonzales v. Department of Army,* 718 F.2d 926, 928-29 (9th Cir. 1983); *Johnson v. Alexander,* 572 F.2d 1219, 1224 (8th Cir.), *cert. denied,* 439 U.S. 986 (1978). That still appears to be the case. *See, e.g., Hodge v. Dalton,* 107 F.3d 705, 707-08 (9th Cir.), *cert. denied,* 522 U.S. 815 (1997); *Randall v. United States,* 95 F.3d 339, 343 (4th Cir. 1996), *cert. denied,* 519 U.S. 1150 (1997), *reh'g denied,* 520 U.S. 1182 (1997); *see also* 29 C.F.R. § 1614.103(d)(1) (2000) (Part 1614 does not apply to uniformed members of the military departments).

Second, Mackey's "internal" military remedies were inadequate even if one were to assume that a military victim of sexual harassment could put her fear of retaliation aside and blow the whistle on a superior officer. In the early 1990's, uniformed military personnel had three options for advancing claims of discrimination. They could: (1) file a complaint under the Department of Defense Equal Opportunity Program [32 C.F.R. § 191]; (2) pursue a claim under Article 138 of the Uniform Code of Military Justice ("UCMJ") [10 U.S.C. § 938]; or (3) proceed before the Board of Correction of Military Records [10 U.S.C. § 1552]. Rogers, *A Proposal for Combating Sexual Discrimination in the Military: Amendment of Title VII,* 78 Calif. L. Rev. 165, 182 (1990).

A servicewoman who pursued relief under either the Equal Opportunity Program or UCMJ Article 138 was required to use the chain of command by first presenting her claim to her superior officer who might also be, and in this case was, the offending officer. *Id.* at 184. A comparable procedure by a non-military employer – mandating processing

unreasonable as a matter of law. *See Faragher,* 524 U.S. at 806-09. Furthermore, superior officers who next reviewed a claim might give little credence to complaints against their colleagues brought by lower ranking servicemembers and many complainants apparently believed that claims processed in this manner went unheeded or provoked retaliation. Rogers, *supra,* at 184 (citing *Women in the Military: Hearings Before the Military Personnel and Compensation Subcomm. of the House Comm. on Armed Services,* 100th Cong., 1st and 2d Sess. 28, 136 (1987 and 1988)). Although the chances of success were slim, Dorothy Mackey tried on at least five separate occasions to seek such supervisory help in stopping the varied and inappropriate behavior.

A further problem with the Article 138 approach is that the UCMJ lacks a specific article explicitly covering sexual harassment. Greenlaw & Port, *Military Versus Civilian Judicial Handling of Sexual Harassment Cases,* 44 Lab. L. J. 368, 368-69 (1993). As a result, the victim of harassment could make a complaint only obliquely by alleging a violation of some other provision of the UCMJ. *Id.* at 369. The claim under military law, therefore, might be far more difficult to establish than a comparable claim of sexual harassment under Title VII (for example, indecent assault requires proof that acts were done with intent to gratify the lust or sexual desire of the accused and that the conduct prejudiced good order and discipline or brought discredit on the armed forces). The complaint procedure involving the Board of Corrections of Military Records did not require use of the chain of command but the various boards of correction had the authority only to correct an error or remove an injustice from an individual's military records. *Id.* at 184-85. Petitioner in fact used the board of correction avenue after her departure from the Air Force, but it could not halt the sexual harassment.

Captain Mackey alleged that her former superior officers subjected her to persistent and varied forms of sexual harassment from 1991 until 1992. During this period, the public was learning about the extent of sexual harassment in the military, including reports of the now famous "Tailhook" Convention (where 26 women were molested), and allegations after the Persian Gulf War of sexual assaults that were reported but never prosecuted. *See, e.g.,* Greenlaw & Port, *supra,* at 368-69; Holzer, *The Endless Ordeals of Jacqueline Ortiz: A Desert Storm Soldier's Unsuccessful Attempt to Recover for a Sexual Assault By Her First Sergeant,* 24 N. M. L. Rev. 51, 68 (1994).

The Sixth Circuit invoked the *Feres* doctrine to bar claims of supervisory sexual harassment in peacetime. If, indeed, the Court of Appeals correctly applied this Court's *Feres* jurisprudence to bar petitioner's claims against the United States, petitioner respectfully urges this Court to issue a writ of certiorari in this case to consider whether the customary adherence to *stare decisis* is warranted and, ultimately, whether the *Feres* doctrine should be overruled as it applies to claims of sexual harassment by military personnel in a non-combatant setting.

Members of this Court will recall that the *Feres* doctrine has been the subject of considerable criticism, including Justice Scalia's characterization of *Feres* as a "clearly wrong" decision that has bred "unfairness and irrationality." *Johnson,* 481 U.S. at 703 (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.). *See also Stanley,* 483 U.S. at 709 (O'Connor, J., concurring in part and dissenting in part); *Stanley,* 483 at 686 (Brennan, J., dissenting, joined by Marshall and Stevens); *Stencel Aero,* 431 U.S. at 676-77 (Marshall, J., dissenting).

J., dissenting, joined by Marshall and Stevens); *Stencel Aero*, 431 U.S. at 676-77 (Marshall, J., dissenting).

Lower courts have been critical of the doctrine as well. They have criticized the shifting rationale for the doctrine. *See, e.g., Taber v. Maine*, 67 F.3d 1029, 1032, 1038-44 (2d Cir. 1995) (as amended) (*Feres* doctrine has gone off in so many different directions that its precise meaning is difficult to know); *Fleming*, 186 F.3d at 699 (the rule may be simply stated but its application is not so neat). Even courts which apply the doctrine recognize the harm shielded by it. *See, e.g., Smith v. United States*, 196 F.3d 774, 778 (7th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 1676 (2000) (sexual assault and harassment is always demeaning, often permanently scars the victim, renders the workplace less productive, and deprives the servicemember of the satisfaction that military service should bring). Because of this recognition, "the *Feres* doctrine is slowly eroding." Darpino, *Eroding the Feres Doctrine - A Critical Analysis of Three Decisions*, 1996 Army Law. 26, 28.

Criticism comes from other camps as well. Academicians and lawmakers have joined in criticizing the *Feres* doctrine. *See, e.g.*, Hornbrook & Kirschbaum, *The Feres Doctrine: Here Today - Gone Tomorrow?*, 33 Air Force L. Rev. 1, 18 (1990); Seidelson, *From Feres v. United States to Boyle v. United Technologies Corp.: An Examination of Supreme Court Jurisprudence and a Couple of Suggestions*, 32 Duq. L. Rev. 219 (1994); Spak & Tomes, *supra*, at 362 and 369; Tomes, *Feres to Chappell to Stanley: Three Strikes and Servicemembers Out*, 25 U. Rich. L. Rev. 93, 97-98 (1990) (the *Feres* doctrine "engendered a storm of criticism"). Even the military recognizes that the *Feres* doctrine has been "a target of widespread criticism," *see* Mattern, *Lutz v. Secretary of the Air Force: At the Edge of*

Perlstein, *TDRL and the Feres Doctrine,* 43 Air Force L. Rev. 259, 259 (1997). Thus, even a Justice who *agrees* with the result reached by the Sixth Circuit should vote to accept this petition for certiorari, if only to assuage the military lawyers who are apprehensive about invoking this Court's own precedent in appropriate cases.

Feres should not bar state law claims for sexual harassment or intentional infliction of emotional distress. Personnel who volunteer for military service voluntarily assume risks of injuries in combat or training. They do not, however, volunteer to be sexually harassed. Such conduct "simply cannot be considered a part of the military mission." *See Stanley,* 483 U.S. at 709 (O'Connor, J., concurring in part and dissenting in part) (criticizing LSD tests).

The time has come for this Court to revisit the *Feres* doctrine and determine whether the harm that the doctrine seeks to prevent is real and whether the harm caused by the doctrine is greater than any harm prevented. The *Feres* doctrine is the *only* judicially created exception to the Federal Tort Claims Act ("FTCA"). *See* Hornbrook & Kirschbaum, *supra,* at 18. The lower courts now apply the *Feres* doctrine to bar recovery under the FTCA for intentional acts of murder, rape, and sexual harassment. This could not have been the intention of *Feres*, nor is such application in our own national interest. If the lower courts are misapplying the *Feres* doctrine, the error must be corrected. If, however, the lower courts are correctly applying *Feres,* the doctrine must be set aside.

CONCLUSION

The Court of Appeals erred in affirming the district court's grant of judgment to the United States under *Feres* because application of the doctrine to claims of sexual harassment by military supervisors in a non-combat context revives sovereign immunity for acts over which sovereign immunity has been explicitly waived by the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, 2674. For the foregoing reasons, petitioner Dorothy Mackey prays that this Court grant her petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

/s/_____
JOANNE JOCHA ERVIN
Counsel of Record
135 W. Dorothy Lane, Suite 101
Dayton, Ohio 45429-1477
(937) 294-8420

MARK E. WOJCIK
The John Marshall Law School
315 S. Plymouth Court
Chicago, Illinois 60604-3639
(312) 987-2391

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99-4022

DOROTHY MACKEY, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

Appeal from the United States District Court for the Southern District of Ohio at Dayton. No. 96-00140 – Susan J. Dlott, District Judge.

Argued: August 3, 2000

Decided and Filed: September 12, 2000

Before: NELSON and NORRIS, Circuit Judges; MATIA, District Judge.*

* The Honorable Paul R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

ALAN E. NORRIS, Circuit Judge. This appeal comes to us for the second time. In 1998, this court reversed an order of the district court holding that the individual defendants named in the complaint were not acting within the scope of their employment. On remand, the district court entered an order substituting the United States as defendant and dismissing the case pursuant to the *Feres* doctrine, which bars claims under the Federal Tort Claims Act ("FTCA") for injuries that arise incident to military service. *See Feres v. United States,* 340 U.S. 135 (1950).

On appeal, plaintiff Dorothy Mackey maintains that the *Feres* doctrine does not apply to claims involving intentional torts. She also argues that, even if the doctrine is generally applicable to such claims, it does not apply to this case.

I.

The circumstances giving rise to this case are fully set forth in our earlier opinion and we will not restate them in detail here. *See Mackey v. Milam,* 154 F.3d 648, 649-50 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 2393 (1999). Briefly, Mackey filed suit in state court against her superior officers in the United States Air Force, alleging sexual harassment. When the U.S. Attorney certified that the officers were acting within the scope of their employment, the case was removed to federal court and the United States was substituted as defendant. The district court determined that the officers were not acting within the scope of their employment, but certified that decision for interlocutory appeal. We reversed, holding

that the officers were acting within the scope of their employment when they allegedly harassed Mackey. *See id.* at 652.

On remand, the district court entered judgment for the United States, stating:

> This matter is before the Court upon the mandate of the [Sixth Circuit]. Based upon such mandate, the Court finds that the individual defendants were acting within the scope of their employment. Therefore, the United States is hereby substituted as the defendant in this case, and the matter is not remanded to the Ohio state court. Under the *Feres* doctrine, "the Government is not liable where the injuries arise out of or are in the course of activity incident to service." *Feres v. United States,* 340 U.S. 135, 146 (1950).

II.

The FTCA waives the United States' liability for tort claims, subject to certain exceptions. *See* 28 U.S.C. §§ 2674, 2680. The "*Feres* doctrine" refers to the Supreme Court's conclusion that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres,* 340 U.S. at 146.

With respect to the claims that are at issue in this appeal, Mackey makes two major arguments.[1] First, she argues that the *Feres* doctrine does not apply to intentional torts. Second, she argues that, even if the *Feres* doctrine does apply to intentional torts, it should not be applied under the circumstances of this case. Neither argument is persuasive.

A. Application to Claims of Intentional Torts

Mackey argues that the *Feres* doctrine applies only to claims of negligence. She correctly points out that the situations addressed in *Feres* involved claims of negligence. She further maintains that the doctrine is derived from the first exception to the FTCA, which excludes from suit "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation." 28 U.S.C.A. § 2680(a) (1994). Mackey's implicit argument seems to be that if the *Feres* doctrine is derived from an exception using terms of negligence, it must be targeted solely at negligence.

Nothing in *Feres* suggests that it is derived from the "due care" exception to the FTCA. Instead, the *Feres* doctrine stems from the exception for claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C.A. § 2680(j); *see Fleming v. United States Postal Serv.*, 186 F.3d 697, 699

---

[1] The only claims at issue in this appeal are those for intentional infliction of emotional distress, sexual harassment, and sex discrimination. *See* 28 U.S.C.A. § 2680(h) (providing that the FTCA does not apply to "[a]ny claim arising out of assault, battery, . . . or interference with contract rights").

(6th Cir. 1999) (indicating that the *Feres* doctrine is a broadening of the section 2680(j) exception).

Furthermore, the rationales behind the doctrine are not limited to situations of negligence. In *United States v. Shearer,* 473 U.S. 52 (1985), the Court identified the underlying rationales as: (1) the peculiar and special relationship of the soldier to his superiors; (2) the effects of the maintenance of such suits on discipline; and (3) the extreme results that might obtain if suits under the FTCA were allowed for negligent orders given or negligent acts committed in the course of military duty. *See id.* at 57 (quoting *United States v. Muniz,* 374 U.S. 150, 162 (1963)). A later case, *United States v. Johnson,* 481 U.S. 681 (1987), set out the underlying rationales as: (1) the distinctively federal character of the relationship between the government and members of its armed forces; (2) the existence of generous statutory disability and death benefits; and (3) the impact of allowing lawsuits, which would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. *See id.* at 689-91.

The Supreme Court has also applied the *Feres* doctrine to more than just negligence claims. Specifically, *Feres* has been applied to claims of constitutional violations alleged in *Bivens* actions. *See, e.g., Chappell v. Wallace,* 462 U.S. 296, 303-04 (1983) (involving claim of race discrimination). In *Chappell,* the Court indicated that:

> The special nature of military life - the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel - would be undermined by

> a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. Here, as in *Feres*, we must be "concern[ed] with the disruption of '[t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court."

Id. at 304. The Court also indicated that Congress had not provided a damages remedy for claims by military personnel of violations of constitutional rights. *See id.* Putting together the "unique disciplinary structure" of the military and Congress' (lack of) activity in the field, the Court held that military personnel did not have available to them a *Bivens*-type remedy against their superior officers. *See id.* While Congress' activity in the field is different with respect to Mackey's claims as opposed to *Bivens*-type claims, the rationale expressed in *Chappell* regarding the special nature of military life applies equally to the present case.

There is no authority in the FTCA or Supreme Court precedent to apply the *Feres* doctrine only to claims of negligence and not to claims of intentional torts. We join with the other United States Courts of Appeals that have addressed the issue and hold that the *Feres* doctrine applies to intentional torts. *See Bois v. Marsh*, 801 F.2d 462, 471 (D.C. Cir. 1986); *Trerice v. Summons*, 755 F.2d 1081, 1084-85 (4th Cir. 1985); *Stubbs v. United States*, 744 F.2d 58, 59-61 (8th Cir. 1984); *Mollnow v. Carlton*, 716 F.2d 627, 628 (9th Cir. 1983); *Jaffee v. United States*, 663 F.2d 1226, 1235 (3d Cir. 1981) (en banc); *Citizens Nat'l Bank of Waukegan v. United*

States, 594 F.2d 1154, 1157 (7th Cir. 1979); *Rotko v. Abrams,* 455 F.2d 992 (2d Cir. 1972) (per curiam).

B. Application to Circumstances of this Case

Mackey also argues that, even if the *Feres* doctrine applies to intentional tort claims, the underlying principles of the doctrine do not apply to her case. Her argument focuses on the potential impact to military discipline.

According to Mackey, allowing her suit would not negatively impact military discipline because the need for such discipline has never been adequately supported. Despite her arguments, the Supreme Court has held that military discipline is a matter of concern and that allowing lawsuits would impair such discipline. *See Shearer,* 473 U.S. at 57; *Johnson,* 481 U.S. at 690-91.

Mackey also argues that her claims do not implicate issues of judgment, discretion, or command because the activities she complains of "simply cannot be viewed as acceptable in any fashion." She maintains that she is not challenging any work assignments, discipline, or evaluations, nor is she challenging her superiors' authority to give her orders. Review of the Supreme Court's concerns with respect to military discipline demonstrates that this case would impact military discipline. In *Shearer*, a serviceman was kidnaped and murdered by another serviceman who had been convicted of manslaughter while assigned to a different Army base. *See* 473 U.S. at 53-54. The deceased serviceman's mother sued the Army alleging that it was negligent in how it dealt with the previously convicted serviceman. The Court found that the allegations in *Shearer* went directly to the management of

the military, calling into question "basic choices about the discipline, supervision, and control of a serviceman." *Id.* at 58. The Court pointed out that the claims would require officers to testify as to each other's decisions and actions, meaning that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions. *See id.* In the present case, the same sort of testimony would be required. *See also Major v. United States*, 835 F.2d 641, 645 (6th Cir. 1987) (applying *Feres* doctrine to claims that military officers failed to follow regulations prohibiting on-base consumption of alcohol because a challenge to the officers' actions would require them to testify about military decisions relating to alcohol on base as well as disciplinary policies for infractions of rules).

Mackey also maintains that any potential harm to military discipline cannot overcome the actual harm to the public interest of denying her a remedy for the conduct alleged in this case. The government counters by pointing out that application of the immunity doctrine neither minimizes the seriousness of the alleged sexual misconduct, nor completely deprives Mackey of a remedy in light of the availability of discipline through the Uniform Code of Military Justice, 10 U.S.C. § 801, *et seq.*, and the existence of benefits programs available to injured service members. *See Smith v. United States*, 196 F.3d 774, 778 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 1676 (2000). The logic of Mackey's argument is also undermined by *Feres* progeny in general. *See, e.g., Shearer*, 472 [sic] U.S. at 53 (implying that interest in military discipline overcomes public interest in preventing kidnaping and murders).

Finally, Mackey appears to argue that *Feres* should be overruled. While there are many arguments available to criticize the *Feres* doctrine, *see, e.g., Johnson,* 581 [sic] U.S. at 692-701 (Scalia, J., dissenting), this court cannot overrule Supreme Court precedent. *See Hutto v. Davis,* 454 U.S. 370, 375 (1982).

III.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

[Filed July 16, 1999]

No. C-3-96-140

DOROTHY MACKEY, *Plaintiff(s)*,

v.

DAVID W. MILAM, et al. *Defendant(s)*.

District Judge Susan J. Dlott

ORDER

This matter is before the Court upon the mandate of the United States Court of Appeals for the Sixth Circuit. Based upon such mandate, the Court finds that the individual defendants were acting within the scope of their employment. Therefore, the United States is hereby substituted as the defendant in this case, and the matter is not remanded to the Ohio state court. Under the *Feres* doctrine, "the Government

is not liable where the injuries arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950).

Accordingly, judgment is hereby entered on behalf of the defendant.

IT IS SO ORDERED.

/s/_____
Susan J. Dlott
United States District Judge